BROAD'S CASE AND SET-OFFS

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Fortunately you won't ask me to comment upon the taxation aspect of Broad's case which must be a peculiar matter for domestic lawyers. However, can I give you a tip in looking at taxation cases which was given by Lord Reid shortly after he retired as our Senior Law Lord in one of his farewell speeches just before he died. He said in his very quiet voice:

> "Unlike some of my brethren, I never had any difficulty in the construing of a taxation case provided I first of all put out of my mind all concepts of logic, fairness and justice."

Looking at the common law side of this, can I say in no offensive sense, that I substantially disagree with a lot of what has been said both by John King and by Robert Turner so far. I won't go into it all now but it is a good job there are disagreements between lawyers and bankers otherwise there wouldn't be any work for either of us, would there, or not for the lawyers anyway. A lot of the trouble which has arisen, and the trouble in Broad's case, was that they took the document in the first place. Well, they didn't need it. The reason why they had it is because bankers are rather like small children. They can't go to sleep unless they have got their teddy bear or little bit of blanket and they must have it, only they call it security.

In Broad's case they didn't need to risk the case with the 50 cents or $5.80, they have got a much better right of set-off under the bankers right of set-off which is far better than the common law right of set-off and far better than a contractual set-off.

Some of the superiorities of the banker's right of set-off is this - unlike banker's lien - banker's right of set-off carries with it a right of sale which no other lien does and not merely a right to hang on to the deposit or to the security until you have been paid. It also applies to any securities or other property deposited with the banker as a banker, which of course doesn't include things for safe keeping which anybody can do, even though they are not those of the customer provided the banker acted in good faith which used in this context simply means that he didn't know they were somebody else's.

If you want the authority for that, see Mutton v. Peat [1900] 2 Ch. 79. Mr Peat was the founder of the great firm Peat Marwick Mitchell which now bears his name and operates in Australia as well. You will see there the way in which securities were amalgamated, accounts were amalgamated and securities which shouldn't have been lodged did not belong to the stockbroker who had gone bust, were nevertheless used by the bank. You cannot get that by contract so why do you go for the contract? Well the answer is because bankers want to sleep at night but they are quite wrong.

I would say that bankers ought to have the courage of the common law and the law merchant, which is to say we will go now for our banker's right which is superior to anything you can get with a little piece of paper. It takes a strong-minded lawyer and a courageous banker to realise that this is so, but it is so. The way in which you are liable to lose those rights is by having these vast long general conditions which go on for pages. All the continental banks use them and they are going to use them in London. The trouble is that if you have yards of conditions the courts say you didn't intend to contract on the common law basis; therefore your only rights are contractual and what you have achieved by yards and yards of words is in fact to lose rights which were far stronger. So you should think twice about being paid by the yard for the drafting that you do because one sentence of advice to the banker "don't" is far more valuable than sheets and sheets of paper which do not really apply.

I have another reason for disagreeing with my colleagues I am afraid and that is simply this: that the law of set-off doesn't exist. What you have in fact got is a lot of quite separate rights derived from different places. They are derived from the law merchant which is different from the rights at common law, derived from the statutes which are different from both of them, derived from equity which is different from those again: they all use the same name but they deal with different things. I sometimes say it is rather like cows. Even in Australia where you have a lot more than we do, you call cows, brown cows and white cows and maybe black cows and not much more. But if you were a self-respecting Zulu you would know about 800 names for cows so you could identify by name any type of cow in a whole herd, and the chap you were talking to would know as well. Set-off is very like that. There is a vast number of different things which all have the same name and they are all different and any attempt to say one must define set-off and then I will know where I am, I will just work it out, will fail. You cannot reconcile the cases or the statutes.

I say this with some bitter experience because in 1979 I was instructed with another QC and a couple of barristers to produce a definitive opinion of set-offs for the use of one of the London firms which has half the market in syndicated loans where set-off is desperately important. Four years later after 28 drafts we gave it up. We produced 170 pages: I can't give you a copy of it even if you wanted it to help you go to sleep because our

clients have the copyright - they did say we could have the paperback and TV rights, but they don't seem to be worth very much. We gave up because it is simply impossible to make a logical jurisprudential analysis of the law on this subject. It can only be done by statute. Therefore when you are given the problem in set-off what you have got to do is to see first of all if it is anything that could possibly be called a set-off in the first place and then you have got to slot it in to where you have the legal precedents that cover that type of set-off. The fact that something - a brown cow with yellow horns in the next field - might have the same name in England, but would have a different name in Zulu does not mean it is the same animal and it is no use trying to wrench those principles over to a different case altogether. It simply will not work.

The only other comparable total despair of which I am known by lawyers is similar to this. It was our own Law Commission in England which attempted to codify the law of contract, which was thought a rather good thing to do when it was first set up. But after six or seven years they gave up too. The English law of contract is so idiosyncratic that it was to end up to be quite impossible to codify and they quietly dropped it without making anything public about it but in fact the task was impossible. So it is with set-off.